APPENDIX.

Opinion of the Appellate Court for the Second District of Illinois in Sundquist v. Illinois Fire Insurance Company of Peoria, 305 Ill. App. 160.

This suit was instituted by Anton E. Sundquist to recover upon a fire insurance policy issued by the Illinois Fire Insurance Company in the sum of $3,000.00 and which covered plaintiff's stock of merchandise and fixtures while contained in a brick building located at No. 315 and No. 317 Market Street in Galva, Illinois. The trial resulted in a verdict and judgment for the plaintiff for $3,165.42 and defendant has appealed.

The record discloses that Sundquist conducted a retail furniture store in Galva and in addition to the policy of insurance which forms the basis of this suit, appellee had in force on December 24, 1936, the date of the fire four other policies aggregating $15,500.00, all covering his stock of merchandise and fixtures. Upon two of these policies aggregating $9,000.00 appellee brought suit and recovered a judgment for $9,259.95, which was sustained by this Court. *Sundquist* v. *Hardware Mutual Fire Ins. Co.*, 296 Ill. App. 510. Thereafter the judgment of this court was affirmed by the Supreme Court. *Sundquist* v. *The Hardware Mutual Fire Ins. Co.*, 371 Ill. 360.

The facts with reference to the origin of the fire and the financial condition of appellee sufficiently appear in these opinions of the Supreme Court and of this court and need not be repeated. Upon the trial of the instant case the defendant contended, as did the defendants in the former case, that the fire was of incendiary origin and there was evidence tending to establish that defense. In his opening argument to the jury one of appellee's attorneys referred

to the fact that one of the defenses interposed by the defendant was arson, which counsel asserted must, under the law, be proven by the defendant beyond all reasonable doubt. Counsel for appellant objected and the court overruled the objection and counsel for the plaintiff then said: "They must prove beyond all reasonable doubt, as I told you in the beginning, what they had to do." In his concluding argument to the jury, another of plaintiff's counsel in commenting upon the defense that the fire was of incendiary origin, said: "That is the way it looks to me. People are presumed to be honest and righteous unless the contrary is shown. Therefore the law places upon these men the burden, if this man has committed a crime which excuses them from meeting the provisions of this contract, then they must come here with evidence that shows him guilty of the crime of arson beyond all reasonable doubt." Counsel for defendant again objected. The court overruled the objection and counsel for plaintiff then continued: "We contend that is the law and the court sustains our contention this far in the argument at least." In this connection counsel for defendant tendered to the court the following instruction which was refused. "The Court further instructs the jury that if you believe from a preponderance or greater weight of the evidence that the plaintiff, with intent to cheat and defraud the defendant, wilfully and maliciously set fire to or caused to be set fire to or burned or caused to be burned, the property described in the policy of insurance sued on, then your verdict should be for the defendant."

This refused instruction is in the identical language of the refused instruction set forth in the opinion of the Supreme Court in *Sundquist* v. *Hardware Mutual Ins. Co., supra*, at page 363. That case overruled *Rost* v. *Noble and Co.*, 316 Ill. 357 and the cases therein cited, the court stating that the reasonable doubt rule which required proof

of the commission of a felony beyond a reasonable doubt, either as a cause of action or a defense in a civil suit would no longer be adhered to in this state and expressly held that this instruction should have been given. The court concluded, however, that the refusal to give this instruction did not require a reversal of that judgment inasmuch as the record disclosed that no instruction was given saying anything about reasonable doubt but did disclose that an instruction was given which required a finding for the defendant if it was shown by a preponderance of the evidence that the plaintiff had falsely sworn that he was ignorant of the origin of the fire. The record in that case also disclosed that a special interrogatory had been submitted to the jury which specifically found that the plaintiff did not swear falsely when he said the cause of the fire was unknown to him. It likewise appears from the record in the instant case that appellee did not request nor did the court give any written instruction requiring proof of anything beyond a reasonable doubt and the ninth given instruction in the instant case is identical with the tenth given instruction as appears on pages 365 and 366 of the opinion of the Supreme Court in the former Sundquist case. However, no special interrogatories were submitted to the jury in the instant case. The record here then differs from the record in the former case in two particulars, first the absence of a special finding to the effect that the plaintiff did not swear falsely when he said the cause of the fire was unknown to him and second the erroneous statement of the law made in counsel's argument to the jury which the trial court sanctioned. The record discloses that appellee only requested one instruction which was to the effect that if the jury found the issues for the plaintiff that interest should also be allowed. Appellant tendered twenty-two instructions, fifteen of which were given as offered, one modified and six refused. In none of them were the jury told that they should be governed by the law as found in the instruc-

tions. The statement of the applicable law enunciated by counsel for appellee in their argument was erroneous. The trial court should have sustained an objection thereto. The only conclusion the jury would have been warranted in arriving at after the court had overruled counsel's objection was that defendant must prove this particular defense not by a preponderance of the evidence but beyond a reasonable doubt. Under the holding of the Supreme Court the refusal of the tendered instruction under the facts as disclosed by this record necessitates a reversal of this judgment.

It is also insisted by counsel for appellant that the record discloses appellee to have been guilty of such fraud and false swearing after the loss as to render the policy sued on void under the provisions of the policy and it is insisted that the record is entirely different in this respect from the record in the former case. It is also insisted that the verdict of the jury on the issue of the extent of the loss is against the weight of the evidence. Inasmuch as this case must be submitted to another jury it is not necessary for us to consider these alleged grounds for reversal and we refrain from expressing our opinion as to the weight of the evidence upon these issues. Neither is it necessary for us to pass upon the alleged improper remarks made by the counsel for appellee in the presence of the jury during the progress of the trial or the refusal of the trial court to sustain appellant's challenge to the array of petit jurors.

It is also insisted that the trial court erred in permitting Theodore Sundquist, a son of appellee, to testify that in his opinion the actual cash value of the merchandise in appellee's store on May 1, 1936 was between sixteen and twenty thousand dollars. His testimony disclosed that he was working in the Galva store and assisted his father in making up the inventories of that date which were offered and admitted in evidence. His testimony further disclosed that at the time of the hearing he was employed, and had

been for a year and a half, by Sears, Roebuck and Company in Chicago in the office of the Merchandise Superintendent of that company and that his daily work had to do with watching the prices and price changes of furniture, rugs and all lines of merchandise. He testified that before going to Chicago he worked as a salesman in the Galva store for his father about three years, was familiar with the stock, had handled most of it, knew the wholesale and retail values thereof and had called off the various items of merchandise to his father at the time his father listed it in the inventories referred to. He was cross-examined at length by counsel for appellant and gave his opinion of the value of certain items inquired about and was unable to do so as to others. In our opinion his testimony was competent and the weight to be accorded it was a matter exclusively for the jury. The trial court refused to admit in evidence a certified copy of the bankruptcy proceedings and appraisers' report which disclosed the purchase of the Emery stock by Sundquist in 1922. In view of the condition of the record at the time this offer was made, we are inclined to think it was admissible. The other error complained of occurred while J. W. Sundquist, a brother of appellee, was on the witness stand. He testified that a piano frame found in the debris after the fire was a "Vose" piano. The plaintiff from his seat at counsel's table in an audible voice said: "Schiller piano." Counsel for appellant moved the Court to direct the reporter to insert in the record this occurrence which was done, the Court stating: "All right. The Court will allow that, as the court heard it himself." Nothing further appears in the record. Of course it was improper for appellee to have made this statement. The court did everything which counsel for appellant requested. All of it occurred in the presence of the jury and will not occur again.

For the reasons indicated, the judgment appealed from will be reversed and the cause remanded.

REVERSED AND REMANDED.